IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10903 of 2000

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHANKERLAL NEBHUMAL UTTAMCHANDANI
Versus
COMMISSIONER OF INCOME TAX

Appearance:
MR JP SHAH for Petitioner
MR MANISH R BHATT for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE M.S.SHAH

Date of decision: 06/12/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This is a petition under Article 226 of the Constitution by an individual who was a partner in the firm called M/s. City Construction, ("the firm") for refund of income tax paid by the petitioner for A.Y.S. 1987-88 to 1989-90.

2. The firm filed a declaration under the Kar Vivad Samadhan Scheme (KVSS or scheme) and was granted the benefit under the scheme and the firm accordingly paid income tax at the rate of 35% of the disputed income which worked out to Rs.73,107/-. The petitioner thereafter made an application dated 8.4.99 (Exh.B) claiming a refund to the tune of Rs.11,64,249/- on the ground that the petitioner had already earlier paid the tax on the income derived by the petitioner as a partner of the said firm in respect of Assessment Year 1987-88, for which the declaration under the KVSS was filed by the firm. The claim for refund was subsequently revised to Rs.13,28,207/- by the petitioner's letter dated 13.10.1999 (Exh. F). The application came to be rejected by letter dated 16.12.99 (Exh.H) of the C.I.T., Surat on the ground that the petitioner's claim for refund was not permissible in view of the explicit provisions contained in K.V.S.S. 1998. Thereafter the petitioner also applied for refund of Rs.17 lacs and odd amount for A.Y. 1988-89 and for Rs.6 lacs and odd amount for A.Y. 1989-90. The petitioner has approached this Court for directing the Department to refund the tax of Rs.40 lacs and odd amount.

3. Mr.J.P.Shah, Learned Counsel for the petitioner has invited our attention to Chapter IV(4) of the "KVVS Scheme". Learned Counsel has also invited our attention to the circular (Exh.P) published on 17.12.98. Since heavy reliance is placed on the said circular, it is quoted in its entirety as under:-

> "Under the provisions of the Kar Vivad Samadhan Scheme (KVSS), the partners of a registered firm are exempted from further tax on their hare of income once the firm settles the dispute paying 35 per cent of the disputed income.
>
> However, prior to the assessment year 1993-94, the firms were paying taxes at concessional rates varying from 4 to 24 per cent, and the partners paid taxes on their share of income at the rates applicable. As a result, firms who want to avail of KVSS for the assessment year 1992-93 and earlier were at a disadvantage compared to other assessees. A number of representations have been

received pointing out the anomalous position.

To enable such firms to avail of the benefit of KVSS, the Government has clarified that, where a registered firm alongwith all its partners files declarations in respect of assessment year upto 1992-93, the arrears of the firm and the partners would be considered together and they may pay taxes at the current rate of 35 per cent, of the disputed income of the firm. The partners would not be required to pay any further tax on their share of income from the firm.

It is also clarified that, where the partners are otherwise eligible under the scheme in respect of any other disputed income, they may file declaration for such income also alongwith that of the firm. They have to pay taxes separately at the current rate of 30 per cent, of such other disputed income as provided in the scheme. Those partners who have separately filed declarations already may now file revised declaration alongwith that of the firm."

It is submitted by Mr.Shah that the thrust of the circular is that incentive given was - if the firm pays the tax under the KVSS, the partners would not be required to pay any further tax on their share of income from the Firm. Till 1992-93, the firms were required to pay taxes varying from 4 to 24 percent and partners were required to pay further tax on their share in the income of the firm at a much higher rate. Under the KVSS, firms were required to pay 35%. Nobody would like to pay at the rate of 35% when the rate of tax for the firm was 24% or less. It is submitted that since the firm as well as the partners were to be made beneficiaries of the Scheme, from that angle it is clear that the tax paid by the firm under the declaration under the scheme must be treated as tax payable by the firm as well as tax payable by the partners. Hence the tax paid by the partners earlier in respect of an assessment year for which the firm has filed declaration under the KVSS is required to be refunded to the partners.

It was further submitted that the Department has rejected the petitioner's application under misconception of the statutory provisions that no refund is to be paid. Mr.Shah contends that all that Section 93 provides is that any amount paid in pursuance of a declaration shall not be refunded but this provision will not apply to a tax which was already paid by a partner earlier prior to

filing of the declaration, on the partner's share in the income of the firm for which the declaration is filed by the firm under the Scheme. The firm's income being interconnected with the income of the partner, the latter would also get benefit of the KVSS.

4. On the other hand Mr.Mihir Joshi, Ld. Counsel for the respondent has submitted that the Scheme was applicable only in respect of "tax arrears" as clearly provided in Section 88 read with Section 87-N containing the definition of "tax arrears."

It is further submitted that a bare perusal of the circular makes it clear that when a registered firm alongwith all its partners files declaration in respect of A.Y. 92-93 the arrears of the firm and partners will be considered together and they pay taxes at 35% of the current disputed income of the firm. The Circular merely amplifies the provisions of the statutory scheme where both the firm as well as the partners had filed declarations in respect of the tax arrears of the firm as well as of the partners. Since in the instant case, the partners were already assessed to tax u/s. 143(3) of the I.T.Act at the relevant time and the partners paid up their tax dues prior to 31.3.98 no tax was payable by the petitioner herein and, therefore, there were no arrears of tax as far as the petitioner was concerned.

5. Having heard the Learned Counsel for the parties and having perused the relevant provisions of the KVSS, 1998 as contained in Chapter 4 of the Finance Act of 1998 and also the circular at Annexure P to the petition, we are satisfied that there is no substance in the grievance being made on behalf of the petitioner.

6. Section 88 clearly provides that when a person makes declaration in respect of tax arrears then the amount payable under the Scheme by the declarant shall be determined at the rates specified i.e. 35% in the case of the declarant being a firm. Section 87N defines "tax arrears" to mean the amount of tax penalty or interest determined on or before 31.3.98 but remaining unpaid on the date of declaration. There is no dispute about the fact that the declaration was filed only by the firm in respect of its tax arrears to the tune of Rs.1,36,341/and not by its partners. There is also no dispute about the fact that the petitioner himself had paid his tax dues for the relevant assessment years prior to 31.3.98 and that in respect of the assessment years in question there were no arrears of tax as far as the petitioner was concerned in his capacity as a partner of the firm. In

this view of the matter, it cannot be said that the petitioner is entitled to claim any refund of tax already paid by him prior to 31.3.1998. It is very much clear from the provisions of the scheme that the scheme was enacted to recover tax arrears by giving opportunity to the assessees by or against whom the disputes for tax liability were pending before the concerned taxing authority or the Tribunal or the Court. Admittedly no proceedings were pending between the petitioner and the department in respect of the assessment years in question on the date of the declaration.

7. As far as the Circular at Exh. E is concerned, the rationale for giving concession to the firm is made clear in the said circular. It was only where tax arrears of a firm a well as of its partner had remained unpaid on 31.3.1998 that the clarification would come into play, that is, the tax was required to be paid only by the firm at the rate of 35% and in that case the arrears of tax payable by the partners on their share in the income of the firm for the relevant year were not required to be separately paid. In the facts and circumstances of this case, it is an admitted position that there were no tax arrears of the petitioner on the relevant date (31.3.1998) in respect of the relevant assessment years and therefore, the question of applying the circular does not arise.

7. In view of the above discussion, the petition is devoid of any merit. The petition is accordingly summarily dismissed with costs.

(D.M.Dharmadhikari, CJ)

(M.S.Shah, J)
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